SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
SEP 18 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-401

ADOLFO de la PARRA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

1. Opinion of the Court Below 1
2. Statutory Provision Sustaining Jurisdiction 2
3. Questions Presented and How Raised 2
4. Statutes and Regulations Involved 4
5. Statement of the Case 4
6. Facts 5
7. Reasons for Granting Writ 7
8. Argument 11

I. Double Jeopardy Is Present 11

II. Speedy Trial 16

III. The Denial of a Hearing Before the Local Board Was Arbitrary and Prejudicial to the Petitioner and He Was Deprived of Procedural Due Process, Particularly Because of the Delinquency Processing 20

IV. No Wilfulness 23

V. *Gutknecht* Applies 23

VI. Regulations (Medical Claims) Ignored 28

Conclusion 31

Appendix A—Opinion, United States Court of Appeals for the Ninth Circuit A1

Appendix B—Order Denying Petition for Rehearing A2

Appendix C—Order Extending Time to File Petition for Writ of Certiorari A2

Appendix D—Statutes and Regulations Involved A3

TABLE OF AUTHORITIES

Abbate v. *U. S.*, 359 U.S. 187, 79 S.Ct. 666 (1959) 13, 14
Ashe v. *Swenson*, 397 U.S. 426, 90 S.Ct. 1189, 25 L.Ed.2d 469 8
Chaney v. *U. S.*, 406 F.2d 809 (5 Cir., 1969), 1 SSLR 3337 30
D'Aquino v. *U. S.*, 192 F.2d 338 (C.A. 9) 16, 19
Downum v. *U. S.*, 372 U.S. 734 (1963) 11
Ehlert v. *U. S.*, 401 U.S. ..... (1971) 30
Ex parte Lange, 18 Wall. 163 (1874) 11
Foley v. *U. S.*, 290 F.2d 562 (C.A. 8, 1961) 16, 19
Graves v. *U. S.*, 252 F.2d 878 (9 Cir., 1958) 23
Gutknecht v. *U. S.*, 396 U.S. 882 (1970), 2 SSLR 3367 .....4, 7, 9, 18
Harlow v. *U. S.*, 301 F.2d 361 (C.A. 5) 16, 19
Heldon v. *Laird*, 306 F.Supp. 1351 (S.D.N.Y. 1969), 2 SSLR 3511 30
Kellett v. *Superior Court*, 48 Cal. Rptr. 366 14
Knox v. *U. S.*, 200 F.2d 389 (9 Cir., 1952) 29
Mann v. *U. S.*, 304 F.2d 394 (C.A.D.C. 1962) 16, 17, 19
McGee v. *U. S.*, ... U.S. ..... (1971) 29-30
McKart v. *U. S.*, 395 U.S. 185, 89 S.Ct. 1657 (1969), 2 SSLR 3023 .....18, 24, 27
Mizrahi v. *U. S.*, 409 F.2d 1219 (9 Cir., 1969), 2 SSLR 3042 28
Murray v. *Blatchford*, 307 F.Supp. 1038 (D.R.I. 1969), 2 SSLR 3516 30
Nickens v. *U. S.*, 323 F.2d 808 (C.A.D.C. 1963) 16, 17, 19
Oshatz v. *U. S.*, 401 F.2d 912 (9 Cir., 1968), 1 SSLR 3301 .....23, 31
Parker v. *U. S.*, 252 F.2d 680 (C.A. 6) 16, 19
People v. *Hryciuk*, 366 Ill. 2d 500, 224 N.E.2d 250 (1967) 16, 17, 18, 19
Petition of Provoo, 17 F.R.D. 183 (D.Md.), aff. *sub nom.* *U. S.* v. *Provoo*, 350 U.S. 857 .....16, 17, 19
Pollard v. *U. S.*, 352 U.S. 354 (19....) 18, 19

Ross v. *U. S.*, 349 F.2d 210 (C.A.D.C. 1965) 16-17
Rusk v. *U. S.*, 419 F.2d 133 (9 Cir., 1969), 2 SSLR 3428 29
Sanchez v. *U. S.*, 341 F.2d 225 (9 Cir. 1965) 13
Sexton v. *Barry*, 223 F.2d 220, cert. den. 77 S.Ct 94, 352 U.S. 870, 1 L.Ed.2d 76 22
Taylor v. *U. S.*, 238 F.2d 259 (C.A.D.C. 1956) 16, 17, 19, 20
U. S. ex rel. Luster v. *McBee*, 422 F.2d 562 (7 Cir., 1970), 2 SSLR 3621 30
U. S. v. *Baker*, 416 F.2d 202 (9 Cir., 1969), 2 SSLR 3306 29
U. S. v. *Berry*, 443 F.2d 5 (9 Cir., 1971), 4 SSLR 3177, 1 NCDD 4013 30
U. S. v. *Blaisdell*, 294 F.Supp. 1303 (D.Me. 1968), 1 SSLR 3143 30
U. S. v. *Brudney*, ... F.Supp. ..... (N.D.Cal. 1971) ... 30
U. S. v. *Burlich*, (1966, D.C.S.D.N.Y.) 257 F.Supp. 906 .. 22
U. S. v. *Doran*, 418 F.2d 1226 (9 Cir., 1969), 2 SSLR 3407 29
U. S. v. *Ford*, ... F.2d ..... (1 Cir., 1970), 3 SSLR 3442 30
U. S. v. *Hansen*, 314 F.Supp. 91 (D.Minn. 1969), 2 SSLR 3493 30
U. S. v. *Hayden*, ... F.2d ..... (9 Cir., 1971), ... SSLR ....., ... NCDD 26
U. S. v. *Hoffman*, 137 F.2d 416 (2 Cir., 1943) 23
U. S. v. *Lloyd*, 431 F.2d 160 (9 Cir., 1970), 3 SSLR 3171 24
U. S. v. *Lustman*, 258 F.2d 475 (1958) 17
U. S. v. *Masaaki Kuwabara*, 56 F.Supp. 716 22
U. S. v. *Parcels of Land in Prince George's County, Md.*, 40 F.Supp. 436 22
U. S. v. *Powers*, 413 F.2d 834 (1 Cir., 1969), 2 SSLR 3182 29
U. S. v. *Prescott*, 301 F.Supp. 1116 (D.N.H. 1969), 2 SSLR 3172 30
U. S. v. *Shermeister*, 425 F.2d 1362 (7 Cir., 1970), 2 SSLR 3492 30
U. S. v. *Stark*, 418 F.2d 901 (9 Cir., 1969), 2 SSLR 3342 29
U. S. v. *Stoppelman*, 406 F.2d 127 (1 Cir., 1969), 1 SSLR 3299 29

U. S. v. *Stow*, U.S. D.C., C.D. of Cal., No. 6543-Criminal, December 7, 1970 15
U. S. v. *Thomas*, 442 F.2d 1259 (9 Cir., 1971), 4 SSLR 3187, 1 NCDD 4007 30
U. S. v. *Waterfield*, No. 3143-ND (D.C. Calif.) 21
U. S. v. *Wheeler*, 149 F.Supp. 445 22
Venus v. *U. S.*, 287 F.2d 304 (C.A. 9) 16, 19

REGULATIONS AND STATUTES

Constitution of the United States—

Fourth Amendment 22
Fifth Amendment 4, 8, 12, 13, 17, 19, 22, A3
Sixth Amendment 4, 8, 16, 17, 19, A3

Federal Rules of Criminal Procedure—

Rule 8(a) 4, 15, A4
Rule 48(b) 4, 9, 14, 15, 16, 20, A4

Regulations (32 C.F.R.)—

1622.1 ..... 4, 29, A4
1622.17 ..... 4, A5
1625.1 ..... 4, 29, A5
1625.2 ..... 4, 29, A6
1625.4 ..... 4, 29, A6
1628.10 ..... A7
1628.11 ..... 4, 28, A7
1628.12 ..... A8
50 U.S.C. App. 462 12

OTHER AUTHORITIES

Black's Law Dictionary (Revised Fourth Edition, 1968) 11
Local Board Memorandum 14 27
Ninth Circuit Draft Digest, NCDD 2057-5, Comment 6 .. 30

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1971, denial of Petition for Rehearing. It is Appendix B to this petition.

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Order, dated August 11, 1971 to September 18, 1971. It is Appendix C to this petition.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The Motion for Dismissal of the Indictment, the Motion for Judgment of Acquittal and the briefing in the Court of Appeals raised the following questions:

I. **Double Jeopardy.** Two questions are involved here:

(1) May a prosecutor ignore a fact, clearly present in the record (the entire Selective Service System file, an exhibit used by him in a first and successful prosecution for induction refusal) a violation of law [to wit, a failure by a Selective Service System registrant to *report for a physical examination*], and after said conviction for induction refusal was reversed, proceed against the registrant on the known failure to report for the physical examination using exactly the same evidence? This appears to be a question of first impression.

(2) Are unfair harassment and collateral estoppel present here?

II. **Speedy Trial.** Four questions are involved here:

(1) Does the deliberate delay of two years in the filing of a criminal charge by the federal government violate the Speedy Trial guaranties of the *Sixth Amendment* when the government had shortly after the commission of the alleged offense all of the evidence which it ever would have pertinent to the charge?

(2) Does the deliberate delay by the federal government in the filing of an indictment on one offense, which delay prevents the joinder of such count in the same trial with another count, when all of the evidence offered by the government in support of each charge was presented in both trials, constitute in seriatim harassment in violation of the Due Process Clause of the *Fifth Amendment*?

(3) Does the deliberate delay in the filing of a charge on one offense so that such charge can be filed in the event of an unsuccessful prosecution on another charge constitute a violation of the Due Process Clause of the *Fifth Amendment* by inhibitng the exercise of rights to fair trial and appeal?

(4) Is Rule 48(b), Federal Rules of Criminal Procedure violated where the courts below refused to grant a motion to dismiss?

III. **Meeting the Local Board.** Does fairness require a requested second opportunity to meet the board when the livelihood of a registrant requires frequent travel and, at the time of the original invitation his wife wrote the board explaining why he could not cross the entire continent to attend and did state when he could be present?

IV. **Wilfulness.** Is wilfulness an element of the crime of failure to report for a physical examination and is wilfulness present when a man has a good excuse for non-attendance?

V. **Gutknecht v. United States,** 396 U.S. 882 (1970). Was the prosecution fatally tainted as caused and flowing from the lawless categorization of the petitioner as a delinquent?

VI. **Regulations ignored.** Did the board blatantly ignore its own regulations when it permitted its clerk to file away evidence and not present it to the board for its consideration? We refer to the evidence of physical defects, a matter not passed on by the board at a meeting, or otherwise.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth and Sixth Amendments and Federal Rules of Criminal Procedure Rule 8(a) and Rule 48(b), Agency Regulation: 32 C.F.R. §§ 1622.1(c), 1622.17, 1625.1, 1625.2, 1625.4, 1628.11(b) and 1628.11(c). They are set forth in Appendix D.

5. STATEMENT OF THE CASE

A. **Trial.** The indictment charged petitioner with a violation of the Universal Military Training and Service Act *for refusing to take a physical examination* [C.T. 1].[1]

Petitioner pleaded not guilty and was tried by Judge Francis Whelan sitting alone, without a jury. He was found guilty and sentenced [C.T. 27].

B. **Prior Court Proceedings:**

(1) Prior to the above the petitioner had been prosecuted, and convicted, in the same court on an indictment for failing to submit to induction, the indictment being

1. C.T. refers to the Clerk's Transcript.

in one count, ignoring the known prior failure to report for a physical examination.

An appeal was taken to the United States Court of Appeals for the Ninth Circuit, *de la Parra* v. *United States*; conviction reversed on September 9, 1970, ____ F.2d ____.

Subsequent to the above appeal's determination petitioner was again indicted, as aforesaid under TRIAL; before trial he filed a Motion for Dismissal. It was denied. Upon trial he was convicted and appealed [Opinion of the Court of Appeals is in Appendix A].

6. FACTS

The facts are found in two places:

(1) The Complete Selective Service System file of the appellant and

(2) The oral testimony in the trial court.

Adolfo de la Parra registered with the Selective Service System on March 13, 1968 [Ex. 3].[2] He was classified I-A on May 20, 1968 [Ex. 11].

Petitioner had been born February 8, 1946 [Ex. 3], but did not enter the United States (from Mexico) until 1967 [Ex. 13]. Hence the reason for not registering until 1968.

Petitioner was sent an Order to Report for Armed Forces Physical Examination for July 1, 1968 [Ex. 16] on June 17, 1968. Due to the fact that he is a musician and was touring the country he did not learn of the Order until his return home on the afternoon of July 1, 1968 [Ex. 17].

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2. Ex. refers to the government's exhibit, the complete Selective Service System file of petitioner. Each sheet is pencil paginated, lower left corner.

He left on a tour of Europe August 29, 1968 and missed a subsequent opportunity to take the physical examination in September 1968 because he was out of the country [Ex. 19].

The Selective Service System declared him a delinquent [Ex. 20] mailing him such notice on September 24, 1968 and on October 23, 1968 sent him an Order to Report for Induction as a Delinquent, his Order being so stamped. [Ex. 21].

On October 29, 1968, petitioner requested SSS Form 150 for conscientious objector, from his Local Board No. 112, stating "I have deliberated on this at great length and have finally made up my mind." [Ex. 22].

He requested the Local Board to reopen his classification, consider his claim, and grant him an interview [Ex. 22].

In SSS Form 150, petitioner made out a prima facie case for the I-O conscientious objector classification [Ex. 24-33].

The Local Board requested him to present himself for an interview for December 3, 1968 [Ex. 36].

When petitioner's wife received the notice from the Local Board, she at once wrote that he was on tour at that time, but would return December 10th and would be available for the rest of December [Ex. 37]. The Local Board received the letter November 29, 1968 [Ex. 37].

Despite the fact that the Local Board knew that he would be available for an interview for the period December 10, 1968 to December 31, 1968, the board sent a notice for an interview for January 7, 1969 [Ex. 41]. Petitioner was out of the country in January, 1969 and was unable to attend the interview [Ex. 42].

The Board then sent him another induction order, for February 11, 1969 [Ex. 45]. He was to report for induction in Los Angeles on the morning of February 11, 1969; he was in New York, February 10, 1969 and planned to immediately fly back to Los Angeles, but was physically prevented from doing so. Because of snow, no plane could leave New York, February 10, 1969. He therefore sent a telegram so informing the Local Board on the morning of February 11, 1969 [Ex. 46].

The Local Board ordered petitioner to report for induction July 29, 1969. He reported but refused induction.

7. REASONS FOR GRANTING WRIT

Point I. **Double Jeopardy:**

(1) The record presents a double jeopardy problem that is apparently one of first impression. None of the lawyers involved in this litigation (nor in an identical one where I represented John Norman Stow, No. 6543, C.D. Ca., dismissed on Motion to Dismiss) could find anything squarely in point.

This point, as now decided by the Ninth Circuit adversely to our position seemingly permits a prosecutor in this jurisdiction to delay and harass defendants with a multi-sword-of-Damocles by permitting the filing of later charges based upon an alleged action which was a necessary element of the offense for which defendant had been vindicated by the Court of Appeals. The alleged failure to report for the pre-induction physical was the basis for "delinquency". Since, a valid induction order is an element of the offense of refusing induction, the validity of the "delinquent" induction order by pre-*Gutknecht* standards depended upon the failure to report for pre-induction phys-

ical. Thus, the latter act was a necessary element to the refusal to submit charge.

(2) A prosecutor should be required to press all charges stemming from the same evidence at one trial, rather than being allowed to shop between a variety of juries, judges, appeal court panels and wear a defendant down by successive prosecutions.

Point II. **Speedy Trial:**

(1) The *Sixth Amendment* protects defendant against pre-indictment delays that are unwarranted by legitimate and compelling reasons. Any delay can affect a defendant's ability to adequately prepare his defense. A [illegible]ars delay without a compelling reason is not tolerated by the Sixth Amendment.

(2) The prevention of joinder of offenses by deliberately delaying the indictment on a second count harasses a defendant by subjecting him to an extra trial in violation of the Due Process Clause of the *Fifth Amendment*. Our courts are too clogged to allow this particular type of harassment. Also, the *Fifth Amendment* doctrine of collateral estoppel prohibits such a seriatim prosecution. *Ashe* v. *Swenson*, 397 U.S. 426, 90 S.Ct. 1189, 25 L.Ed.2d 469, 475-477.

(3) Defendants in this jurisdiction will be inhibited in the exercise of their rights to fair trial and appeal if they know that success could result in the filing of further charges based on the same evidence but omitted in the original indictment, but that an undisturbed conviction will result in no further charges being pressed. This is particularly harmful when a defendant has been given a relatively lenient sentence and is considering the fact that successful appeal could result in new charges with a harsher

sentence. Prosecutors should be required to exercise their discretion on how many counts to press (relating to the same evidence) at the time of the first indictment.

(4) It was an abuse of discretion for the trial judge to deny the motion to dismiss based on Rule 48(b) Rules of Federal Procedure. It is clear that the government's delay in this case was deliberate and caused substantial prejudice to the defendant.

Point III. **Deprivation of Hearing.**

This is important to all draft registrants in that fundamental fairness requires a reasonable second opportunity to meet the board when the first invitation is not wilfully ignored but, on the contrary a good reason is given.

Point IV. **Wilfulness** is necessarily an essential element of the crime of failure to report for a physical examination. There is no valid evidence in the record from which an inference of wilfulness can be drawn. No man should be convicted on this record.

Point V. **Gutknecht,** supra controls. This decision has been applied retroactively and should cover this proper extension of its holding.

Unlawful delinquent status should not be the basis for prosecution *vel non* on a separate criminal charge. The facts of this case show that appellant's prosecution for failure to report for pre-induction physical *resulted from* his delinquency status. Registrants who failed to report for pre-induction physical but who were not illegally classified as delinquents were not prosecuted. A citizen should be as entitled to due process of law in the events leading to prosecution. This prosecution is a "poisonous fruit" from the tree of delinquency condemned by *Gutknecht.*

Point VI. **Regulations ignored by local boards,** as follows:

(1) The defendant made various medical claims starting with his initial Classification Questionnaire.

(2) A letter from Dr. Salvador Sanchez Perez verifying the serious allergic condition arrived at the local board on June 17, 1968.

(3) The Minutes of Action by Local Board [Ex. 11] indicates that the local board did not review this medical letter.

(4) The same Minutes also indicate that the local board did not review the defendant's selective service file between the dates of June 17, 1968 and August 14, 1968, inclusive, the latter being the date of mailing of the second SSS Form 223 [Ex. 18]. This second Order scheduled a pre-induction physical for September 5, 1968. Both Orders were issued by the clerk and not the local board. The indictment is for failure to report for a pre-induction physical on September 5, 1968.

The regulations charge the local board with the responsibility to select which registrants shall be forwarded to a pre-induction physical in any given month.

Selective Service regulations also require the local board to consider all information submitted to it which is pertinent to classification.

Medical information is not excepted from this general requirement.

The circumstances of the case make clear that any change of timing of the pre-induction physical probably would have resulted in his reporting.

8. ARGUMENT

I

Double Jeopardy Is Present.

A. The common law of the English speaking people has long held that a second trial for the same offense is forbidden when the defendant has been acquitted. *Ex parte Lange*, 18 Wall. 163, 169 (1874).

Here in the United States we have a constitutional prohibition against double jeopardy. The Fifth Amendment provides that ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ."

In stating what is "Double Jeopardy" Black's Law Dictionary (Revised Fourth Edition, 1968) states:

> "Common-law and constitutional prohibition against 'double jeopardy' refers not to the same offense eo nomine but to the same crime, transaction or omission. Driggers v. State, 137 Fla. 182, 188 So. 118, 120. A second prosecution after a first trial for the same offense. People ex rel Rozea v. Warden of Queens County Jail, 43 N.Y.S.2d 211, 213."

And Mr. Justice Douglas, speaking for the Supreme Court in *Downum* v. *United States*, 372 U.S. 734 (1963) at 736, stated:

> "For the prohibition of the Double Jeopardy Clause is 'not against being twice punished but against being twice put in jeopardy'. United States v. Ball, 163 U.S. 662, 669."

Such is the situation before the Court in the Case of Adolfo de la Parra. For de la Parra had been indicted

for an alleged violation of 50 U.S.C. App. 462, Military Selective Service Act of 1967. The claimed violation was that on June 30, 1969 he "knowingly failed and neglected to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the Armed Forces of the United States as so notified and ordered to do so." He was convicted and sentenced. His conviction was reversed, as recited in Statement of the Case, hereinabove.

In the first conviction the evidence of the government consisted solely of the entire Selective Service System file of de la Parra. The claimed violation set forth in the second conviction is "failure to report for a pre-induction physical examination on September 5, 1968, as ordered." The Selective Service System file introduced in the first case contained the entire record of his dealings with the Selective Service System and all facts pertaining to the charge in the present case. Such facts were *plainly* present in the file and we have a right to presume were known to the United States Attorney and to the Grand Jury when the one count indictment in the first case was asked by the former and brought by the latter.

Therefore petitioner contends that he has been placed in double jeopardy by this second prosecution of violation of the Military Selective Service Act of 1967 and that his rights as a citizen, guaranteed by the Fifth Amendment to the United States Constitution have been violated.

B. It is submitted that this prosecution was so grossly unfair as to be violative of due process. The fundamental common law and constitutional rights of petitioner affording protection against his being tried again for the known offense are present in this case. Thus the plea of former jeopardy applies in this factual situation.

The question raised by the pleas in this case is whether the two prosecutions relate to the same conduct. Petitioner contends that they do and that therefore his prosecution is illegal. As the Court of Appeals stated in *Sanchez* v. *United States*, 341 F.2d 225, (1965) 9th Cir.:

> ". . . the question raised by a plea of double jeopardy is simply whether the two prosecutions relate to the same conduct."

In considering whether double jeopardy applies in a factual situation the Court is concerned with determining the identity of offenses charged in successive trials.

The Federal Courts have used two basic tests in determining the identity of offenses: The "same evidence" test, and the "same act or transaction" test. These two tests have usually been applied in all double jeopardy problems.

In order to satisfy the "same evidence" test, only substantial identity is required between the evidence adduced at the first proceeding and that of the second.

In these Selective Service cases the government's evidence was presented in the Selective Service System file of appellant. Thus, under the "same evidence" test, prosecution again of petitioner violated his rights under the Fifth Amendment. Here the evidence is concerned with the same conduct.

More recently the Courts have disregarded the narrow reading of the Fifth Amendment protection and in place of the "same evidence" rule they have substituted a broad transactional test to determine identity of offense.

In *Abbate* v. *United States*, 359 U.S. 187 (1959), 79 S.Ct. 666, Mr. Justice Brennan, in a separate opinion, at 197 stated:

> "I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests."

In *Kellett* v. *Superior Court*, 48 Cal. Rptr. 366, Chief Justice Traynor of the California Supreme Court stated at 368:

> "If only a single act or an individual course of criminal conduct is charged as the basis for a conviction, the defendant can be prosecuted only once although he may have violated more than one statute. Whether a course of criminal conduct is divisible. . . depends on the intent and objective of the action."

Thus it can be understood when *Kellett* is read in the light of *Abbate* that offenses are identical for the purposes of double jeopardy, when the defendant's intent is the same for both offenses charged.

In the case before the Court, petitioner's intent, if any, was to evade the orders of the Selective Service System to the end that he might avoid induction. That purpose was subject to prosecution in the first indictment and trial. Furthermore, the prosecution is attempting to protect the same federal interest, namely, the effective functioning of the Selective Service System, in the second indictment. The petitioner's acts or omissions, in the worst light, all pointed toward the same object; in addition, the acts were interdependent. Therefore, under the "same transaction" test, the acquittal in the first trial should act as a bar to the second prosecution.

C. Further, petitioner contends that the indictment brought against him should have been dismissed pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure. The Rule states:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing any information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint."

In the case now before the Court there was a delay in presenting the evidence to a grand jury so that an indictment might be returned. The delay was wholly without justification. The prejudice to the petitioner is not merely the passage of time, but also the added embarrassment and expense of successive criminal trials.

The government cannot justify its delay on the theory that the offenses required separate trials, for Rule 8 (a), 18 U.S.C.A., Federal Rules of Criminal Procedure, authorizes joinder of offenses "based on the same act or transactions connected together or constituting parts of a common scheme or plan."

Thus Rule 48 (b) and 8 (a) require dismissal. The words of Federal Judge Harry Pregerson in a recent case (*United States of America* v. *John Norman Stow*, U. S. District Court, Central District of California, No. 6543-Criminal, December 7, 1970), could well apply to the present situation:

> "This case does have certain overtones of double jeopardy and it does have certain overtones of piecemeal prosecution. That expression is found in Sanchez v. United States, 341 F.2d 225. In a sense, the second prosecution relates to, generally, the same conduct.
>
> One initially thinks of some doctrine of merger. The failure to report for a physical, and the failure to keep the board advised of his address, somehow ought to have been merged with the offense that he was originally tried on: failure to report for induction.

These are all, in a sense, violations of the rules that occurred before the actual failure to report before the induction board.

I think that the Indictment ought to be dismissed in the interests of justice, and I base my ruling primarily on 48 (b), that there has been an unnecessary delay in presenting this matter to the Grand Jury. On that basis I am going to grant the motion, primarily."

II

Speedy Trial.

The traditional emphasis of the Sixth Amendment right to speedy trial has concerned unreasonable delays between the time of indictment and the time of trial. Delays between the time of the alleged offense and the time of indictment are within the province of the statute of limitations and Rule 48 (b) of the Federal Rules of Procedure. However, several courts, perhaps including the Supreme Court, have held that delays in the filing of charges can under various circumstances impinge upon constitutional guaranties. Two different constitutional defenses have been used: 1) right to speedy trial as guaranteed by the 6th Amendment, *People* v. *Hryciuk*, 36 Ill. 2d 500, 224 N.E.2d 250 (1967); *Mann* v. *U. S.*, 304 F.2d 394, 396-397 (n.4) (C.A.D.C. 1962); *Taylor* v. *U. S.*, 238 F.2d 259 (C.A.D.C. 1956); *Petition of Provoo*, 17 F.R.D. 183 (D.Md.), affirmed *sub nom. U. S.* v. *Provoo*, 350 U.S. 857; *Nickens* v. *U. S.*, 323 F.2d 808, 812 (C.A.D.C. 1963) (Cir. J. Wright concurring); but see to the contrary, *Foley* v. *U. S.*, 290 F.2d 562 (C.A. 8 1961); *Harlow* v. *U. S.*, 301 F.2d 361 (C.A. 5); *Parker* v. *U. S.*, 252 F.2d 680 (C.A. 6); *D'Aquino* v. *U. S.*, 192 F.2d 338 (C.A. 9); *Venus* v. *U. S*, 287 F.2d 304 (C.A. 9); and 2) right to fair trial as guaranteed by the Due Process clause of the Fifth Amendment. It is recognized that pre-indictment delays can obstruct a defendant's ability to obtain a fair trial. *Ross* v. *U. S.*, 349 F.2d 210

(C.A.D.C. 1965); *Petition of Provoo*, supra; *Nickens* v. *U. S.*, 323 F.2d 808, 810 (n.2) (majority opinion). *Mann* v. *U. S.* interprets the Supreme Court affirmance of *Provoo* as having "settled the point" that there is a Sixth Amendment protection against "undue" delays arising between the time of the alleged offense and the time of indictment.

The Second Circuit has held that prejudice need not be demonstrated when the Sixth Amendment is violated by "undue" delay. *U. S.* v. *Lustman*, 258 F.2d 475 (1958). The same was held by the District Court of Maryland, *Petition of Provoo*, 17 FRD 183, 203. The Circuit Court for the District of Columbia modifies this position somewhat and makes prejudice a rebuttable presumption. *Taylor* v. *U. S.*, supra; *Nickens* v. *U. S.* (concurring opinion), supra. The government has made no showing in the instant case that appellant was not prejudiced by the two-year delay. Even if it were incumbent upon the defendant to demonstrate prejudice, the nature of such prejudice is not confined to his ability to have a fair trial (as is the case under the *Fifth Amendment* Due Process guaranty of a speedy trial). The instant case is on point with *Hryciuk*. The *Hryciuk* court stated, "It is probably a fair inference that if defendant had not been released on the rape conviction the murder charge would never have been brought." 224 N.E.2d 250, 252. Similarly in this case, had the conviction for refusal to submit to induction not been overturned it is clear (indictment on the second charge followed reversal of the first charge by three days) that the failure to report for pre-induction physical examination charge would never have been brought. Placement in criminal jeopardy is extremely prejudicial and is not cured by the opportunity of a fair trial. Also, appellant was prejudiced because he was forced to undergo two separate trials instead of having both counts joined in one proceeding.

It should be emphasized that it is not necessary to show that the prosecution was acting in bad faith when it delayed the indictment, only that such delay was deliberate. *Pollard* v. *U. S.*, infra; *People* v. *Hryciuk*, supra. It is a fair inference that at the time of the first count it was the intention of the prosecution to never proceed with the second count, providing that a conviction could be obtained and sustained on the first count. It is only at the point of reversal of conviction that the question of prosecution on the second count was acted on. It is also to be emphasized that *Gutknecht* v. *U. S.*, 396 U.S. 882 (1970), 2 SSLR 3367, neither commands nor sanctions prosecutions such as are involved in the instant case. In rejecting delinquency as a proper mode for punishing offenses the Court stated in *Gutknecht*, "If federal or state laws are violated by registrants, they can be prosecuted." 2 SSLR 3367, 3369. There is certainly no intendment that such prosecutions would be sanctioned if they violated the Constitution. The only reasonable meaning of this phrase is that such registrants can be prosecuted at the proper time and in accordance with all of their rights, both statutory and constitutional. There is no suggestion that Gutknecht could be prosecuted in 1970 for returning his cards. The Court is saying that at the time of the offense, he could have been prosecuted. It is significant that *Gutknecht* speaks about registrants in general, rather than Gutknecht in particular. The same is true of *McKart* v. *U. S.*, 395 U.S. 185 (1969) 2 SSLR 3023. There was no suggestion that McKart could still be prosecuted for his failure to report for physical examination; only that the government has the power to bring proper prosecutions against registrants who do commit such offenses. In the instant case, as in *Gutknecht* and *McKart*, the government is estopped from proceeding at a much later date on a criminal charge by its earlier choice to omit prosecution on the proper count.

A further reason why certiorari should be granted is that there is an irreconcilable conflict between several jurisdictions on the question of whether the Sixth Amendment guaranty of speedy trial encompasses protection against undue and deliberate pre-indictment delays. Compare *Mann* v. *U. S.*, (C.A.D.C.), supra; *Taylor* v. *U. S.*, (C.A.D.C.), supra; *People* v. *Hryciuk*, (Sup. Ct. Ill.), supra; *Petition of Provoo*, (D.Md.) with *Foley* v. *U. S.*, (C.A. 8), supra; *Harlow* v. *U. S.*, (C.A. 5) supra; *Parker* v. *U. S.*, (C.A. 6), supra; *D'Aquino* v. *U. S.*, (C.A. 9), supra; *Venus* v. *U. S.*, (C.A. 9), supra.

Mann supra, interprets this Court's affirmance of *Provoo* as having "settled the point" that there is a *Sixth Amendment* protection against "undue" delays arising between the time of the alleged offense and the time of indictment.

The distinction between the two constitutional foundations is important and justifies two different approaches. The *Fifth Amendment* approach requires a showing that a fair trial is impossible or at least seriously jeopardized (this in no way implies that distinct Due Process claims cannot be based upon the harassment aspects of the delays, or the inhibiting effect on appeal rights which will be discussed below). However, the *Sixth Amendment* approach requires a very different showing. It requires only that the delays produced by the government was "purposeful *or* oppressive," *Pollard* v. *U. S.*, 352 U.S. 354, 361 (19....); *Nickens* v. *U. S.* (concurring opinion), supra; and that it be prejudicial.

Harassment is involved in this case because it is clear that defendant would never have been indicted on the second count but for his success in overturning the conviction on the first count. The Fifth Amendment should protect against such arbitrary imposition of criminal jeopardy. If the government is estopped from bringing de-

layed indictments based upon the same evidence presented in an earlier case, this form of harassment could be significantly reduced.

(3) The case at bar offers a good illustration of a practice which has the overwhelming effect of discouraging appeals. If a defendant knows that a prosecutor has other charges being held in abeyance and only waiting on the outcome of the outstanding case, such defendant will be seriously inhibited in his pursuit of a fair trial and appeals. This is particularly so when the sentence given after conviction on the first charge is relatively lenient. Such a defendant might well conclude that a successful appeal could result in a harsher sentence on another charge. A requirement that prosecutors not be allowed to keep criminal charges hanging in suspension would allow defendants to pursue appeals according to their merits.

(4) The trial judge abused his discretion in denying defendant's motion under Rule 48(b) of the Federal Rules of Procedure. In the circumstances of this case where it is clear that the delay is "undue" and "deliberate", the trial judge must require the government to show that defendant was not prejudiced by such delay. *Taylor* v. *U.S.*, supra. The government made no such showing, and could not have done so. The judge must exercise his discretion after inquiry and a proper finding of facts.

III

The Denial of a Hearing Before the Local Board Was Arbitrary and Prejudicial to the Petitioner and He Was Deprived of Procedural Due Process, Particularly Because of the Delinquency Processing.

The Local Board selected December 3, 1968 as the date for Appellant's interview [Ex. 36]. When petitioner's wife received the notice from the Local Board, she at once

wrote that he was on tour at that time, but would return December 10th and would be available for the rest of December [Ex. 37]. The Board received the letter in November [Ex. 37]. Despite the fact that the Board knew that petitioner would be available for an interview for the period December 10, 1968 to December 31, 1968, the Board sent a notice for an interview for January 7, 1969 [Ex. 41]. Petitioner was out of the country in January and was unable to attend the interview [Ex. 42]. The Board then sent him an induction order for February 11, 1969 [Ex. 45].

As was pointed out, travel across country and out of country was an essential of petitioner's occupation as a musician. He had a right to expect that the Board would be reasonable and grant him a date for a hearing on a day in which his work would allow him to be in town. He was available for the hearing from December 10, 1969 to December 31, 1969, but the Board refused to grant him a hearing within that period. Instead they assigned him a date when he was out of the country. What Chief Judge Leon Yankwich said in *United States* v. *Waterfield,* No. 3143-ND (D.C. Calif.) could well apply to this case:

> THE COURT: Gentlemen, I think this man was not given due process. I do not believe, when a man makes a request, that a Board can send a letter and then, when notified by the defendant's mother that he is away temporarily, just say, "We won't give you another date."
>
> Obviously, the law does not require the man to hold himself at military attention and salute the moment he asks for a personal interview. He has a right to be treated as reasonable human beings are. This man asked for a personal interview. The letter from the Board reached his home while he was out of town. It is not required for a man, when he has been classified by a Board, to remain in town at the Board's beck and call. The Board should be reasonable about it.

Petitioner's Board was not reasonable and its denial of an interview was arbitrary and prejudicial to him.

"Due process" hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Sexton* v. *Barry*, 223 F.2d 220, certiorari denied 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed.2d 76. Constitutional guaranty of "due process of law" requires observance of those general rules established in our system of jurisprudence for the security of private rights in any proceeding which may result in depriving a person of life, liberty or property. U.S.C.A. Const. Amend. 5; *U. S.* v. *Masaaki Kuwabara*, 56 F.Supp. 716. The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. U.S.C.A. Const. Amend. 5; *U. S.* v. *Parcels of Land in Prince George's County, Md.*, 40 F.Supp. 436. In regard to "due process" it should be pointed out that the constitutional provisions for security of person and property should be liberally construed. U.S.C.A. Const. Amends. 4, 5; *U. S.* v. *Wheeler*, 149 F.Supp. 445.

With the above holdings in mind and the facts of this case considered, it is clear that petitioner was deprived of due process of law. He presented evidence which was new and which mandatorily required a reopening of his case, with attendant rights of personal appearance and attendant administrative appellate rights. The Local Board did not formally reopen thereby depriving him of said opportunities.

As the court stated in the case of *United States* v. *Burlich*, (1966, District Court, Southern District of New York) 257 F.Supp. 906 at 909:

> "The board's refusal to reopen his classification deprived him of his right of personal appearance before the board and of his right to an administrative appeal,

and hence of due process, in consequence of which the order for his induction is invalid."

IV

No Wilfulness.

"Culpable intent" is an essential element of the crime charged: refusing to take a physical examination, as ordered by a local board.

Graves v. *United States*, 9 Cir., 1958, 252 F.2d 878, 882;
United States v. *Hoffman*, 2 Cir., 1943, 137 F.2d 416, 419.

It is true that in our case the petitioner did not appear for a physical examination, as ordered, but in each instance he presented a good excuse [Ex. 17, 19, 22, 46].

If it was his intent to balk the Selective Service System would he have reported for induction? He is peculiarly able to earn a good living anywhere [R.T. 7, 1.22].

Each of the reasons he gave was reasonable to him and would appear so to many people. The pique of the Selective Service System is understandable; that of the Department of Justice is persecutive.

V

Gutknecht Applies.

The *Oshatz** standard for prejudice requires that the defendant "might not stand convicted of a felony". This is significantly broader than the standard of prejudice that the defendant might not have committed the felonious conduct. Thus *Oshatz* allows for the introduction of defenses arising from local board errors that occurred after the actual offense if those errors contributed to the conviction

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**Oshatz* v. *United States*, 9 Cir., 1968, 401 F.2d 912.

of the defendant. See also *United States* v. *Lloyd*, 431 F.2d 160 (9th Cir., 1970) 3 SSLR 3171.

Assuming, *in arguendo*, that the petitioner committed an offense for which a prosecution could be sustained, that does not automatically lead to prosecution. Many policy considerations affect the decision concerning prosecution *vel non* in any given case. *Gutknecht*, supra, limited the options available to the government, but it does not require prosecution for all offenses that may have been committed. *McKart* v. *United States*, 89 S.Ct. 1657, 395 U.S. 185 (1969) 2 SSLR 3023, makes very clear that the government has flexibility in prosecuting these cases.

> "If the Government deems it important enough to the smooth functioning of the system to have unfit registrants weeded out at the earliest possible moment, it can enforce the duty to report for pre-induction examination by criminal sanctions." *McKart* v. *United States*, supra at 1667.

While the government has flexibility in making such decisions, it cannot do so in such a manner that violates the law. We need not argue whether minor procedural errors that contribute to the decision to prosecute require reversal, but we do assert that "blatantly lawless" action that causes a prosecution requires reversal. If the government exercises its discretion so as to prosecute Negroes, but not Caucasians, this would be impermissible. No less invidious is a form of discrimination based upon the "blatantly lawless" authority. This delinquency status, declared illegal by *Gutknecht* v. *United States*, 396 U.S. 882 (1970) 2 SSLR 3367, contributed to de la Parra's conviction in four ways:

A. The local board was affected in its consideration of rescheduling of the pre-induction physical.

B. The local board failed to evaluate the CO claim.

C. The United States Attorney would not have been notified of the offense.

D. The United States Attorney would not have sought an indictment from the Grand Jury.

A. The local board reviewed the defendant's file on September 17, 1968 [Ex. 11]. It had before it for consideration the facts that twice de la Parra had not appeared for a pre-induction physical, that he had offered explanations for each time [Ex. 17, 19], that he had indicated his willingness to submit to physical examination if it could be arranged within his schedule [Ex. 17], that he had submitted medical claims and evidence [Ex. 9, 15]. The board had several alternatives available to it under the regulations of that time: (1) classify de la Parra I-Y or IV-F on the basis of evidence submitted, (2) arrange for an interview with the Local Board Medical Advisor on the basis of medical claims made and evidence submitted, (3) reschedule his pre-induction physical on the basis of his willingness to comply and the reasonableness of his explanations, (4) declare him to be delinquent on the basis of punishment but still allowing the Army to disqualify him if they wish to do so or, (5) report him to the United States Attorney for prosecution because he had flouted the System, notwithstanding any eligibility for medical deferment. The local board decided upon the 4th option, which, it is now recognized, was blatantly lawless. The critical impact of those delinquency regulations is that if the board were confined to the other (i.e. legal) options, it is probable that it would have forwarded him to another pre-induction physical. This is how most local boards responded to this situation between January, 1970 *Gutknecht* and June, 1970, when the regulations were amended. Had another date been set, de la Parra would have reported and certainly not been prosecuted for his

earlier omissions. It is highly probable that the existence of the blatantly lawless delinquency regulations dissuaded the local board from exercising its discretion in such a manner as to seek compliance, rather than prosecution.

B. On October 31, 1968, the defendant filed a claim of conscientious objection with the local board [Ex. 22]. The Special Form for Conscientious Objectors (SSS Form 150) was filed on November 5, 1968 [Ex. 24]. This claim was reviewed but only with the restrictions then applied to post-induction notice CO claims [Ex. 11, 44]. However, this claim was [and had to be] treated as a post-induction notice claim because his delinquency status had accelerated his induction notice. Since there was no fact rebutting his prima facie claim, the denial of the CO claim is but another poisonous fruit of the three of delinquency.

Certainly the CO claim was filed after the failure to report for the pre-induction physical and the denial of such claim did not cause such failure to report. But it is also the policy of the Selective Service not to prosecute persons classified I-O for not reporting for the pre-induction physical. *United States* v. *Hayden*, ... F.2d .... (9th Cir., April 9, 1971); .... SSLR ...., NCDD ..... It seems quite likely that had de la Parra been classified as I-O, he would have been processed for civilian work instead of for criminal prosecution. The latter course of events was caused by the lawless delinquency regulations.

C. It is frequent that registrants will fail to accomplish some duty which omission technically could serve as the basis of a felony prosecution. However, the System is clearly, historically more concerned about obtaining compliance than convictions. Thus, when a registrant fails to keep his local board posted of his address, the board will always first attempt to locate him rather than report him for prosecution. When a registrant fails to keep his

draft cards, attempts are made to secure compliance. In the same spirit, the board will usually reschedule a pre-induction physical if it feels there is a chance for compliance, rather than recommending for prosecution. Local Board Memorandum (LBM) 14 indicates Selective Service policy on failure to report for pre-induction physical examination, failure to report for induction and refusal to submit to induction. LBM 14 instructs that the latter two offenses are to be reported to the United States Attorney for prosecution, but no provisions are made for reporting to the United States Attorney for prosecution any failure to report for physical examination. The file of the defendant indicates that these policies were followed by his local board. The Delinquent Registrant Report (SSS Form 301) was *first* filed in response to the defendant's failure to report for induction on February 11, 1969 [Ex. 53]. No such report was filed with the United States Attorney after the failures to report for the physical examination. The data concerning the latter offenses was added only incidentally to the SSS Form 301 [Ex. 53].

Had the blatantly illegal induction order based upon delinquency not been issued, no report would ever have been filed with the United States Attorney. The United States Attorney will generally respect the wishes of the Selective Service System as a matter of respecting administrative autonomy. See *McKart* v. *United States*, supra. Even though the United States Attorney had the abstract legal right to investigate the offense and prosecute, the realities of Selective Service and Justice Department policies make clear that it was the delinquent induction order that caused this prosecution.

D. The Justice Department has an internal policy of not seeking a 1-count indictment for failure to report for physical examination. This offense is prosecuted only in con-

junction with other counts based upon failure to report for or submit to induction. Thus this prosecution was brought because of its association with the failure to submit to induction count. However, as this Court has already declared *Gutknecht* that count was illegal and founded upon lawless regulations.

VI

Regulations (Medical Claims) Ignored.

The petitioner made various medical claims in his initial Classification Questionnaire (SSS Form 100) [Ex. 8, 9].

A letter from Dr. Salvadore Sanchez Perez verifying the serious allergic condition arrived at the local board on June 17, 1968 [Ex. 15, 80, 81]. Presumably, this letter arrived prior to the mailing of the Order to Report for Armed Forces Physical Examination (SSS Form 223), which occurred on the same date [Ex. 16]. *Mizrahi* v. *United States*, 409 F.2d 1219 (9th Cir., 1969), 2 SSLR 3042. The Minutes of Action by Local Board [Ex. 11] indicate that the local board did not review this medical letter on June 17, 1968. The same Minutes also indicate that the local board did not review the defendant's selective service file between the dates of June 17, 1968 and August 14, 1968, inclusive, the latter being the date of mailing of the second SSS Form 223 [Ex. 18]. This second Order scheduled a pre-induction physical for September 5, 1968. Both Orders were issued by the clerk and not the local board. The indictment is for failure to report for a pre-induction physical on September 5, 1968.

Selective Service regulation 32 C.F.R. 1628.11 (b) and (c) charges the local board with the responsibility to select which registrants shall be forwarded to a pre-induction physical in any given month. Of course, this duty can be

accomplished by the local board clerk if only ministerial functions are accomplished. *United States* v. *Stark*, 418 F.2d 901 (9th Cir., 1969) 2 SSLR 3342; *United States* v. *Baker*, 416 F.2d 202 (9th Cir., 1969) 2 SSLR 3306; *United States* v. *Doran*, 418 F.2d 1226 (9th Cir., 1969) 2 SSLR 3407; *Rusk* v. *United States*, 419 F.2d 133 (9th Cir., 1969) 2 SSLR 3428; *United States* v. *Powers*, 413 F.2d 834 (1st Cir., 1969) 2 SSLR 3182. However, these cases emphasize that if any discretionary element is present, such discretion must be exercised by the local board, not the clerk. *United States* v. *Baker*, supra; *United States* v. *Powers*, supra; *United States* v. *Stoppelman*, 406 F.2d 127 (1st Cir., 1969) 1 SSLR 3299; *United States* v. *Stark*, supra; *United States* v. *Doran*, supra; *Rusk* v. *United States*, supra. As stated in *United States* v. *Powers*, supra at 3184-5:

> We readily concede the importance of the board and only the local board acting on all matters involving discretion. [A]ny new information bearing on the status of any registrant being considered for induction [would present an issue for the board's discretion]. Indeed, just as we said in *United States* v. *Stoppelman*, 406 F.2d 127, 130 that "clerks file communications [from registrants] without calling them to the board member's attention at considerable risk to the validity of subsequent proceedings". . .
>
> We agree with the . . . requirement that the local board itself perform any critical exercise of administrative judgment.

The Ninth Circuit explicitly adopted the rationale of *Powers* in *United States* v. *Baker*, supra.

Selective Service regulations also require the local board to consider all information submitted to it which is pertinent to classification, 32 C.F.R. 1622.1 (c); 32 C F.R. 1625.1, 1625.2 and 1625.4; *Knox* v. *United States*, 200 F.2d 389 (9th Cir., 1952); *McGee* v. *United States*, ... U.S. .....

(1971) (dissenting opinion); *United States* v. *Shermeister*, 425 F.2d 1362 (7th Cir., 1970), 2 SSLR 3492; *Chaney* v. *United States*, 406 F.2d 809 (5th Cir., 1969) 1 SSLR 3337; *United States* v. *Prescott*, 301 F.Supp. 1116 (D.N.H. 1969) 2 SSLR 3172; *United States* v. *Blaisdell*, 294 F.Supp. 1303 (D.Me. 1968) 1 SSLR 3143; *United States* v. *Hansen*, 314 F.Supp. 91 (D.Minn. 1969) 2 SSLR 3493; *Heldon* v. *Laird*, 306 F.Supp. 1351 (S.D.N.Y. 1969) 2 SSLR 3511. Cf. *United States* v. *Berry*, 443 F.2d 5 (9th Cir., May 14, 1971), 4 SSLR 3177, 1 NCDD 4013; *United States* v. *Thomas*, 442 F.2d 1259 (9th Cir., May 11, 1971), 4 SSLR 3187, 1 NCDD 4007; *Murray* v. *Blatchford*, 307 F.Supp. 1038 (D.R.I. 1969) 2 SSLR 3516; *United States ex rel. Luster* v. *McBee*, 422 F.2d 562 (7th Cir., 1970) 2 SSLR 3621. Medical information is not excepted from this general requirement. *Ehlert* v. *United States*, 401 U.S. ..... (1971); *United States* v. *Ford*, ... F.2d ..... (1st Cir., 1970) 3 SSLR 3442; *United States* v. *Brudney*, ... F.Supp. ..... (N.D.Cal. 1971); See also Comment 6 on *Ehlert* v. *United States* in *Ninth Circuit Draft Digest*, NCDD 2057-5.

Dr. Perez' letter submitted on June 17, 1968 was not presented by the clerk to the local board prior to the mailing of either SSS Form 223. This not only deprived the defendant of his opportunity to be classified I-Y or IV-F by the local board at that time, but more significantly to this indictment this error affected the very issuance of the Order to Report for Armed Forces Physical Examination. Had the medical letter been submitted properly, the local board might have chosen to arrange for an interview between the defendant and the Local Board Medical Advisor. It is the uniform practice of boards not to forward to pre-induction physical any registrant who has a pending interview with the Medical Advisor. The local board can classify a registrant I-Y or IV-F on medical

grounds without ever forwarding for a pre-induction physical. Thus we see that the failure of the clerk to present the medical letter to the local board prevented the board from exercising its discretion on the matter of a medical interview and the related matter of forwarding the defendant to a pre-induction physical. We do not need to show that the board definitely would have ordered a medical interview and declined to order for a pre-induction physical. Nor do we need to show the defendant's definite entitlement to such an interview. It is sufficient prejudice to require reversal if the appellant can show that he might not stand convicted of a felony if the regulations had been followed. *Oshatz* v. *United States*, 401 F.2d 912 (9th Cir., 1968) 1 SSLR 3301.

We must note that the petitioner is not a non-cooperator who would not have attended a pre-induction physical at any time. To the contrary, he expressed his eagerness to take such an examination and did so on the first occasion that his occupational and business commitments allowed. The circumstances of the case make clear that any change of timing of the pre-induction physical probably would have resulted in his reporting. The prejudice in this case is far clearer than in *Oshatz* v. *United States*, supra.

CONCLUSION

For the reason given certiorari should be granted.

Respectfully,

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Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.
ADOLFO DE LA PARRA,
Appellant.
No. 71-1255

On Appeal from the United States District Court for the Central District of California

(Filed June 3, 1971)

Before: CHAMBERS, MERRILL and ELY, Circuit Judges.

Per curiam:

The judgment of conviction is affirmed. We reject the double jeopardy argument on this conviction for failure to take a selective service physical examination which he had been ordered to take.

We do not find the punitive aspects here that were present in United States v. Hayden, 9 Cir., No. 25,803 decided April 9, 1971, which is clearly distinguishable.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADOLFO de la PARRA,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 71-1255

Order Denying Petition for Rehearing

(Filed July 20, 1971)

Before: CHAMBERS, MERRILL and ELY, Circuit Judges.

The petition for rehearing is denied.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-155

October Term, 1971

ADOLFA DE LA PARRA,
Petitioner,

vs.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the

same is hereby, extended to and including September 18, 1971.

W. O. Douglas

Associate Justice of the Supreme Court of the United States

Dated this 11th day of August, 1971.

APPENDIX D

[ARTICLE V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

RULE 8

Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

RULE 48

Dismissal

* * *

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Regulations (32 C.F.R.)

PART 1622—CLASSIFICATION RULES AND PRINCIPLES

1622.1 General Principles of Classification.—

* * *

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligilibity for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing

by the local board of a Classification Questionnaire (SSS Form 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

* * *

1622.17 Class I-Y: Registrant Not Eligible for a Lower Class Who Would Be Qualified for Military Service in Time of War or National Emergency.—In Class I-Y shall be placed any registrant who, under the provisions of section 1623.2 of this chapter, is not eligible for a lower class, and would be classified in Class I-A, Class I-A-O, or Class I-O but for the fact that he is found under applicable physical, mental, and moral standards to be not currently qualified for service in the Armed Forces and who would be qualifed for such service in time of war or national emergency declared by the Congress.

* * *

PART 1625—REOPENING AND CONSIDERING ANEW REGISTRANT'S CLASSIFICATION

Reopening Registrant's Classification

1625.1 Classification Not Permanent.—(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.4 Refusal To Reopen and Consider Anew Registrant's Classification.—When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational defer-

ment, or the goverment appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

• • •

Armed Forces Physical Examination

1628.10 Who Will Be Examined.—

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1628.11 Order To Report for Armed Forces Physical Examination.—

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(b) In complying with such Physical Examination Call on Local Board (SSS Form 202), the local board shall mail an Order To Report for Armed Forces Physical Examination (SSS Form 223) to registrants who have been classified in Class I-A, Class I-A-O, and Class I-O without regard to whether the registrants have requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken. The local board shall, so far as is practicable, select and order to report for armed forces physical examination first such registrants who are volunteers in the sequence in which they have volunteered for induction or

for civilian work contributing to the maintenance of the national health, safety, or interest and then such registrants who are nonvolunteers in the order of their liability for service.

(c) The local board may also mail an Order To Report for Armed Forces Physical Examination (SSS Form 223) to any registrant who is classified in a class other than Class I-A, Class I-A-O, or Class I-O if it determines that his induction may shortly occur. The local board shall mail an Order To Report for Armed Forces Physical Examination (SSS Form 223) to a registrant whenever directed to do so by the Director of Selective Service or the State Director of Selective Service.

(d) At the time the local board prepares the original Order To Report for Armed Forces Physical Examination (SSS Form 223), it shall make a copy of such form and shall file the copy in the registrant's Cover Sheet (SSS Form 101).

1628.12 Postponement of Armed Forces Physical Examination.—The issuance of an Order To Report for Armed Forces Physical Examination (SSS Form 223) may be delayed or the forwarding of a registrant under such an order may be postponed to the same extent and in the same manner as provided in section 1632.2 of this chapter with reference to an Order To Report for Induction (SSS Form 252); provided, that any such delay or postponement under the provisions of this section shall terminate whenever the local board determines that the induction of the registrant is imminent, in which event the local board shall order the registrant to report for armed forces physical examination.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-401

ADOLFO DE LA PARRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of willfully refusing to report for a preinduction physical examination, in violation of 50 U.S.C. App. 462(a). Sentence was suspended on the condition that he work for three years in a civilian work assignment approved by the Selective Service System. The court of appeals affirmed *per curiam* (Pet. App. A 1).

The essential facts are not in dispute. Petitioner, a member of a popular rock singing group, registered

448-207—71

with his local draft board on March 13, 1968, and received a I–A classification on May 20, 1968. On June 17, 1968, he was ordered to report for a preinduction physical examination on July 1, 1968. Petitioner failed to report. On July 5, 1968, the local board received a letter from petitioner stating: "I returned home to Los Angeles this afternoon [July 1, 1968] after two months employment as a musician travelling across the United States" (SSF 17).[1] He asked to be given another opportunity to take the preinduction physical.

On August 14, 1968, petitioner was ordered to report for a physical examination on September 5, 1968. He wrote a letter to the board on August 28, 1968 (SSF 19), stating: "This is to inform you that it is totally impossible for me to report for my physical examination on September 5, 1968 as I will be departing for a tour of Europe on August 29, 1968 and will not return to the United States until the middle of October." On September 5, 1968, petitioner failed to report.

Thereafter, on September 17, 1968, petitioner was declared delinquent by the board for failing twice to report for his preinduction physical. He was ordered on October 23, 1968, to report for induction on November 12, 1968. On receiving this order, petitioner filed with his local board a claim of conscien-

[1] "SSF" references are to petitioner's Selective Service file, a copy of which is being lodged with the clerk of this court.

tious objection. His induction was postponed and he was advised, on November 22, 1968, that he could meet with the board on December 3, 1968, to discuss his claim. On November 29, 1968, the board received a letter from petitioner's wife stating that the December 3 date was inconvenient because her husband would then be "on tour out of state" (SSF 37). The personal interview was rescheduled for January 7, 1969. On January 2, 1969, the board was again advised by petitioner's wife that the date was inconvenient as her husband would then be on tour "out of the country" (SSF 42).

The local board then considered petitioner's conscientious objector claim on the basis of the information in his file; on January 8, 1969, it notified him that the board had not specifically found a change in status resulting from circumstances beyond his control and had refused to reopen (SSF 44). He was ordered to report for induction on February 11, 1969. Petitioner failed to report; a telegram received by the board on that day indicated that he was in New York and could not get a plane to Los Angeles because of the snow conditions (SSF 46).

Petitioner was declared delinquent for this failure; he was again ordered to report on July 29, 1969. On this date, he did report, but when his name was called, he refused to take the symbolic step forward.

On September 10, 1969, petitioner was indicted for refusing induction, in violation of 50 U.S.C. App.

462(a). After a non-jury trial in the United States District Court for the Central District of California, he was convicted. The court of appeals reversed on the authority of *Gutknecht* v. *United States,* 391 U.S. 395. *United States* v. *Adolfo de la Parra,* C.A. 9, No. 25047, decided September 9, 1970.

One week later, on September 16, 1970, petitioner was indicted for willfully failing to report for his preinduction physical examination on September 5, 1968. The present conviction followed and the court of appeals affirmed *per curiam* (Pet. App. A 1).

1. Petitioner contends here, as he did below, that he has been put twice in jeopardy by a prosecution for failure to report for a physical examination following the reversal of his conviction for refusal to submit to induction. We do not agree.

Under Selective Service regulations, petitioner had separate duties to report for his preinduction physical as ordered (32 C.F.R. 1628.16) and to report for induction as ordered (32 C.F.R. 1632.14). He failed to comply with either order. It is well settled that he was therefore subject to criminal prosecution for both offenses. See *McKart* v. *United States,* 395 U.S. 185, 201; *United States* v. *McGee,* 426 F. 2d 691 (C.A. 2), affirmed on separate grounds, 402 U.S. 479.

"[T]he question raised by a plea of double jeopardy is simply whether the two prosecutions relate to the same conduct." See *Sanchez* v. *United States,* 341 F. 2d 225, 227 (C.A. 9). Here, they clearly do not; peti-

tioner's refusal to report for his preinduction physical occurred more than ten months before he refused to submit to induction. He explained his conduct in the former instance as being due to the fact that he was "on tour" with his musical group; the later offense was based on his professed conscientious objector beliefs, first presented to the board after receiving a notice to report for induction. Thus, contrary to petitioner's assertion (Pet. 13–14), this case does not present the situation that troubled Mr. Justice Brennan in *Abbate* v. *United States,* 359 U.S. 187; here, the second prosecution is not "based on the same acts as the prior conviction" (359 U.S. at 201, Brennan J., concurring). Moreover, the government's proof in the prosecution for refusing to submit to induction, both as to the validity of the order to report and as to petitioner's willfulness, in no way relates to the proof necessary for conviction on the charge of refusing to report for a preinduction physical examination. Accordingly, the doctrine of collateral estoppel has no application in the present context. Compare *Ashe* v. *Swenson,* 397 U.S. 436.

2. Petitioner also asserts that the passage of two years between commission of the offense for which he was charged in the second prosecution and return of the indictment charging that offense deprived him of his right to a speedy trial and of due process of law. *United States* v. *Marion,* No. 70–19, this Term, probable jurisdiction noted, 401 U.S. 934, presents the

question whether pre-indictment delay short of the applicable statute of limitations may justify dismissal of an indictment, and, if so, what degree of prejudice must be shown. In *Marion,* however, the district court found—though we think erroneously—that the four-year delay involved there prejudiced a potential defense. Here, by contrast, petitioner makes no claim that the delay of two years prejudiced his defense of the second prosecution. Nor does he explain how the government's initial decision to prosecute him only for refusal to submit to induction placed him at any disadvantage. Rather, his position is simply that a lapse in time, without more, requires reversal of the conviction unless the prosecution comes forward to demonstrate that the lapse was innocent and harmless (Pet. 17). This bald proposition is, we submit, settled against petitioner, who must at least show some kind of prejudice in order to establish a constitutional claim.[2] See *United States* v. *Ewell,* 383 U.S. 116, 120, 122; *Dickey* v. *Florida,* 398 U.S. 30, 36–38; see also *United States ex rel. Solomon* v. *Mancusi,* 412 F. 2d 88 (C.A. 2), certiorari denied, 396 U.S. 936; *United States* v. *Parrott,* 425 F. 2d 972 (C.A. 2); *Tynan* v.

[2] Moreover, we note that petitioner did not make the constitutional arguments in the court below, but relied solely on Rule 48(b), Fed. R. Crim. P., an application of which depends entirely upon the discretion of the trial judge. Accordingly, we doubt that the constitutional issues relating to petitioner's speedy trial claim are properly before this Court on this petition. See, *e.g., Lawn* v. *United States,* 355 U.S. 339, 362 n. 16; *California* v. *Taylor,* 353 U.S. 553, 557 n. 2.

United States, 376 F. 2d 761, 762–764 (C.A.D.C.), certiorari denied, 389 U.S. 345.

Moreover, the reason for the lapse in time between offense and indictment was neither a purposeful design to weaken a defense nor negligent. Until July 29, 1969, it clearly was hoped that use of the criminal sanction would be avoided altogether by petitioner's induction. When petitioner was indicted in September 1969, the government quite properly did not bring every possible charge against petitioner. When his original conviction was overturned on the basis of *Gutknecht*, indictment for another outstanding offense was appropriate. Since petitioner has failed to show how he was at all prejudiced by the period of time that elapsed, and there was clearly no unjustifiable delay by the government, we believe it unnecessary for this Court to postpone action on this petition pending decision in *Marion*.

3. Finally, petitioner asserts that the government failed to demonstrate "culpable intent." It is, however, clear that petitioner was fully aware of the order to report for a preinduction physical examination on September 5, 1968. His letter informing the board that he could not comply because he would be "on tour" out of the country on that date (SSF 19) was written the day before he left for his trip and was not received by the board until after his departure. Motive must be separated from intent; it is clear that petitioner intentionally disobeyed the order

involved here. See *United States* v. *Moylan*, 417 F. 2d 1002 (C.A. 4).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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[3] Petitioner also raises claims of procedural irregularity concerning the denial of a hearing with respect to his post-induction-notice conscientious objector claim (but see *Ehlert* v. *United States*, 402 U.S. 99), and the board's declaration of delinquency on September 17, 1968. Whatever merit there might be to these contentions, however, they have no bearing on the present prosecution for an offense committed prior to the alleged procedural irregularities.

Nor is it relevent to this case that the board failed to consider medical information concerning an allergy that petitioner had (SSF 15), which was submitted after the mailing of the order to report for a preinduction physical examination. Even if such information would have entitled petitioner to a I-Y classification—which we doubt—he would not thereby be relieved of his duty to report as ordered on September 5, 1968. This Court pointed out in *McKart* v. *United States*, *supra*, 395 U.S. at 203, that "an invalid classification * * * would not be a defense today to a prosecution for failure to report for a pre-induction physical examination." Nor does *United States* v. *Hayden*, 445 F.2d 1365 (C.A. 9), suggest otherwise. As noted by the court below (Pet. App. A 1), the "punitive aspects" in *Hayden* are not present here.

U.S. GOVERNMENT PRINTING OFFICE: 1971